IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 13197 of 2000

For Approval and Signature:

Hon'ble MR.JUSTICE H.K.RATHOD

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : YES

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

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KANUBHAI PATEL

Versus

STATE OF GUJARAT

Appearance:

1. Special Civil Application No. 13197 of 2000

MR RS SANJANWALA for Petitioner No. 1

Mr. H.L. Jani, AGP for Respondent No. 1-3

CORAM : MR.JUSTICE H.K.RATHOD

Date of decision: 18/07/2001

ORAL JUDGEMENT

Heard learned advocate Mr. Sanjanwala for the petitioner and the learned AGP Mr. Jani for the respondents. In this petition under Article 226 of the

the Constitution of India, the petitioner has challenged the impugned order of detention dated 12th December, 2000 passed by the District Magistrate, Valsad whereunder the petitioner has been ordered to be detained at the Porbandar Jail as Class II detenu. According to the grounds of detention communicated to the petitioner under section 9(1) of the Gujarat Prevention of Anti Social Activities Act, the petitioner has been considered as bootlegger as defined u/s.2(b) of the PASA Act and in all, ten offences have been registered against the petitioner wherein the petitioner has been enlarged on bail in respect of each registered offences. It is pertinent to note that no statement of the secret witness has been recorded by the detaining authority. Looking to the facts of the offence registered against the petitioner, the petitioner is having licence at Daman for sale of foreign liquor and persons purchasing the liquor from him are selling the same in the limits of the State of Gujarat. I have personally verified each and every offence upto 10th. In each of the offence, specific allegation has been made that certain persons have purchased liquor from Shital Bar belonging to the petitioner and thereafter, said liquor has been sold within the limits of the State of Gujarat by some other persons whose names have been mentioned in the respective FIRs lodged against the petitioner. No offence has been registered against the petitioner that he himself is selling the liquor within the State of Gujarat. However, on the basis of the sale of foreign liquor by some other persons which was purchased by such persons from the petitioner from his licensed bar at Daman, the detaining authority has passed the order against the petitioner. Zerox Copy of the licence issued in favour of the petitioner for retail sale of Indian Made FOreign Liquor in Daman is on record from page 14 to 18. The last offence registered against the petitioner on these premises is dated 31st July, 2000 whereas the impugned order of detention has been passed by the detaining authority after a period of about five months on 12th December, 2000. No reply to the present petition.

Learned advocate Mr. Sanjanwala appearing for the petitioner has raised two contentions while challenging the impugned order of detention. The first contention raised by Mr. Sanjanwala is that there is delay in passing the impugned order of detention considering the last offence registered against him. The last offence registered against the petitioner is dated 31st July, 2000 whereas the impugned order of detention has been passed by the detaining authority on 12th December, 2000. There is, therefore, delay of about five

months or so in detaining the petitioner under the provisions of the Prevention of Anti Social Activities Act, 1985 (the PASA Act for short). Specific contention to that effect has been raised by the petitioner in ground (a) of the memo of petition. In support of this contention, Mr. Sanjanwala has relied upon the decision of this Court reported in 1997 (1) GLH page 381.

In Ground (B) of the memo of petition, the petitioner has raised the following contentions :

"That in the grounds of detention, the detaining authority has not recorded any satisfaction that the activities of the detenu are prejudicial to the maintenance of the public order in the area in question. It is a condition precedent for invoking drastic powers of preventive detention conferred by PASA, that there should be disturbance of public order due to alleged prejudicial and illegal activities of the detenu and that the detaining auhtority should be satisfied on the basis of the available that the activities of the detenu are prejudicial to the maintenance of Public Order of the area in question. Such satisfaction should be recorded in the grounds of detention. In the facts and circumstances of the present case, the activities of the detenu are not such as can affect the public order of the area in question. No reasonable person can, on the basis of the material, record satisfaction that the activities of the detenu are prejudicial to the maintenance of public order. The detaining authority has in the grounds of detention, not recorded any such satisfaction. In any view of the matter, the activities of the detenu are not such as would affect the public order and have in fact, not affected the public order of the area in question. The impugned order of detention is required to be quashed and set aside on this ground alone."

In support of this contention, learned advocate Mr. Sanjanwala has relied upon the decision of the apex court reported in AIR 1989 SC 491, Head Note "C" and another decision reported in AIR 1970 SC 852.

Learned AGP Mr. Jani appearing for the respondents has submitted that looking to the the activities carried out by the detenu of selling liquor to the persons who are working and residing within the

limits of the State of Gujarat, the activities of the petitioner were affecting the maintenance of public order and public health. Looking to the ten offences registered against him and also considering the seriousness of the offences registered against him, according to Mr. Jani, there were compelling circumstances for detaining the detenu under the PASA Act and, therefore, the impugned order of detention has rightly been passed by the detaining authority. Mr. Jani has relied upon the decision of this Court in case of Kanuji S. Jhala versus State of Gujarat reported in 1999(2) GLH 417 and has submitted that if there were credible material available before the detaining authority which is affecting the maintenance of the public order and public life, then, the court has not to decide whether the material was sufficient or not to reach the subjective satisfaction and the subjective satisfaction recorded by the detaining authority cannot be said to be not reasonable or ingenuine. Relying upon this decision, he has submitted that considering the activities of sale of liquor carried out by the petitioner in Daman but which is being purchased by the persons residing in the State of Gujarat and which is being sold by them to the persons within the limits of the State of Gujarat, the detaining authority was right in passing the impugned order of detention and, therefore, he has submitted that this Court should not interfere with the impugned order of detention.

I have considered the submissions made by the learned advocates for the parties. I have also considered the two main contentions raised by the petitioner in the memo of petition and pressed into service by the learned Advocate Mr. Sanjanwala during the course of arguments. Looking to the offences registered against the petitioner in each offence which are ten in number, the allegation against him is to the effect that he is selling the liquor to some of the persons whose names and statements are there those who have purchased the liquor from the petitioner and after purchasing it from the petitioner, they are reselling the same in the State of Gujarat. It is not in dispute that the petitioner is having licence for sale of Indian Made Liquor in the Union Territory of Daman and is running Shital Bar at Daman where no prohibition is applicable and he is selling the liquor to the persons who are visiting Shital Bar in Daman and if the persons purchasing such liquor from him at Daman are selling it within the limits of the State of Gujarat, then, for that, obviously, t he petitioner cannot be said to be disturbing the public order or public health but he is

running his business on the basis of the licence in the union territory and these facts have not been disputed by the respondents because no affidavit in reply has been filed by the respondents. Therefore, according to my view, when no statement of the secret witnesses was recorded by the concerned authority and no registered or unregistered offence has been alleged except 10 in number as mentioned in the grounds of detention, according to my opinion, merely committing offence or alleging offence against the petitioner under the Prohibition Act without alleging violation of the said Act by the petitioner, it cannot be said that the public order is being disturbed by the activities of the petitioner. I myself have gone through the grounds of detention but there is no material except the ten offences and there was no any statement of the secret witness which would justify the same. The observations made by the apex court in AIR 1989 SC 491 para 16, 17 and 18 are as under:

"16. It is submitted by Dr Chitale that the allegations which have been made by the said five witnesses against the petitioner are also very general in character and do not involve the question of public order. Counsel submits that there is a distinction between `law and order' and 'public order . The allegations made against the petitioner may give rise to a question of law and order but, surely, they have nothing to do with the question of public order. A person may be very fierce by nature, but so long as the public generally are not affected by his activities or conduct, the question of maintenance of public order will not arise. In order that an activity may be said to affect adversely the maintenance of public order, there must be materials to show that there has been a feeling of insecurity among the general public. If any act of a person creates panic or fear in the minds of the members of the public upsetting the even tempo of life of the community, such act must be said to have a direct bearing on the question of maintenance of public order. The commission of an offence will not necessarily come within the purview of `public order'.

17. In this connection, we may refer to a decision of this Court in Pushkar Mukherjee v. State of West Bengal, [1969] 2 SCR 635 where the distinction between `law and order' and `public order' has been clearly laid down. Ramaswami, J.

speaking for the Court observed as follows:

"Does the expression `public order' take in every kind of infraction of order or only some categories thereof? It is manifest that every act of assault or injury to specific persons does not lead to public disorder. When two people quarrel and fight and assault each other inside a house or in a street, it may be said that there is disorder but not public disorder. Such cases are dealt with under the powers vested in the executive authorities under the provisions of ordinary criminal law but the culprits cannot be detained on the ground that they were disturbing public order. The contravention of any law always affects order but before it can be said to affect public order, it must affect the community or the public at large. In this connection we must draw a line of demarcation between serious and aggravated forms of disorder which directly affect the community or injure the public interest and the relatively minor breaches of peace of a purely local significance which primarily injure specific individuals and only in a secondary sense public interest. A mere disturbance of law and order leading to disorder is thus not necessarily sufficient for action under the Preventive Detention Act but a disturbance which will affect public order comes within the scope of the Act."

18. In the instant case, the detaining authority, in our opinion, has failed to substantiate that the alleged antisocial activities of the petitioner adversely affect or are likely to affect adversely the maintenance of public order. It is true some incidents of beating by the petitioner had taken place, as alleged by the witnesses. But, such incidents, in our view, do not have any bearing on the maintenance of public order. The petitioner may be punished for the alleged offences committed by him but, surely, the acts constituting the offences cannot be said to have affected the even tempo of the life of the community. It may be that the petitioner is a bootlegger within the meaning of section 2(b) of the Act, but merely because he is a bootlegger he cannot be preventively detained under the provisions of the Act unless, as laid down in sub-section (4) of section 3 of the Act, his activities as a

bootlegger affect adversely or are likely to affect adversely the maintenance of public order We have carefully considered the offences alleged against the petitioner in the order of detention and also the allegations made by the witnesses and, in our opinion, these offences or the allegations cannot be said to have created any feeling of insecurity or panic or terror among the members of the public of the area in question giving rise to the question of maintenance of public order. The order of detention cannot, therefore, be upheld."

I have also considered the decision which was cited by Mr.Jani. Looking to the recent decision, it is necessary for the detaining authority to have some material credible material with it before passing the impugned order of detention. It is also necessary that such material on record must have to be shown and the members of the public of the said locality had to run away from there or to go to reside in the house and close their doors. In the instant case, looking to the aforesaid decision of the apex court, there is no other offence registered against the petitioner except ten offences registered against the petitioner and even unregistered offence have also not been noted in the grounds of detention. there was no material on record which was credible on the basis of which the detaining authority could draw reasonable inference as regards adverse effect of the activities of the petitioner on the maintenance of public order as defined under the Act. Therefore, in aforesaid facts of the present case and also in view of the aforesaid decision of the apex court, I am of the view that at the time of passing of the impugned order of detention, there was no material available with the detaining authority to come to the conclusion that the activities of the petitioner were prejudicial to the maintenance of public order.

Looking to the date of the last offence registered against the petitioner and also the involvement of the petitioner in unregistered offence and considering the date of the impugned order of detention, as per my view, there is delay of about four months in passing the impugned order of detention which has not been explained by the detaining authority.

In case of Elesh N. Patel versus Commissioner of Police, Ahmedabad, this Court has held as under in para 21 of the report :

"21. In the instant case, the last registered case is of May 20, 1996. The petitioner detenu was granted anticipatory bail by the competent court. He was also granted regular bail subsequently. The impugned order of detention has been passed on November 5, 1996 i.e. after a delay of five months and fifteen days. If is of course true that the detaining authority has relied on two incidents of 2nd October and 10th October 1996, both unregistered cases. I have gone through the allegations. I fail to understand if the allegations are really of such a grievous nature, why the cases have not been registered against the petitioner. There appears to be some substance in the contention of the petitioner that these two unregistered cases have been referred only with a view to cover up the gap or to give life to a stale case. This unexplained delay makes a ground of detention not proximate, vitiating the order of detention itself. If I am to buttress my findings, I would say the reference may be made to the decision of the supreme court in Anand Prakash v. State of UP reported in AIR 1990 SC 516 and Pradeep Nilkanth v. S. Ramamurthy reported in 1993(2) Suppli. SCC 61."

Therefore, in the facts of the present case and also in view of the aforesaid decision in of this court and also the decision of the apex court in case of Piyush Kantilal Mehta (supra), considering the unexplained delay of about four months in passing the impugned order of detention, the same is required to be quashed and set aside.

In the result, this petition is allowed. Impugned order of detention dated 12th December, 2000, passed by the detaining authority is quashed and set aside. The detenu Shri Dalpatbhai B. Patel who has been detained in Porbandar Jail is ordered to be released forthwith if he is not required in any other case. Rule is made absolute accordingly with no order as to costs. DSP.

18.7.2001. (H.K.Rathod,J.)

Vyas